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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1139.

THEODORE GLADDEN,
Petitioner,

v.

P. HENDERSON & CO.,
Respondent,

v.

LAVINO SHIPPING COMPANY.

BRIEF IN OPPOSITION

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COUNTER STATEMENT.

By reason of injuries alleged to have been sustained on August 21, 1961 the Petitioner instituted this suit. The question raised by the Petition turns upon whether a plaintiff in a personal injury action, who has intruded into the area of collateral source by testifying on direct examination that he has been forced to return to work prematurely and has been unable to obtain additional medical attention by reason of lack of funds,[1] may foreclose all cross-examination by defendant into the accuracy of that part of his direct testimony.

The fact of workmen's compensation was never mentioned and if the inference of compensation arose, it was because plaintiff's own counsel injected it into his opening statement to the jury when he advised the jury that the treating physician had been "selected" (later amended in open court to "paid", R. 319a) by his employer.

Respondent's counsel was most careful in the manner in which he explored that subject so as to do no more than repair the damage done by the plaintiff's testimony without injecting the subject of workmen's compensation. The context of the cross-examination is as follows:

> "Q. Mr. Gladden, I believe that it is stated in an answer to an interrogatory that you went back to work following your treatment by Dr. Krause on October 9, 1961. Can you confirm that that is correct?

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1. "Q. How did you feel after you had worked for a day?
A. I still had stiffness and pain.
Q. Did you go back to see Dr. Krause?
A. No, I did not.
Q. Why not?
A. Well, during the seven weeks that I was out of work seeing Dr. Krause my bills got behind and when I went back to work, that was one of the main reasons I went back to work, was to try to catch my bills up and support my family." R. 277a.

A. I am not sure of the date but I did go back after Dr. Krause had released me.

Q. Now, you testified on direct examination that you were prompted to go back to work because you were suffering from some financial distress; is that correct?

A. I didn't understand the first part of the question. I understood the second part.

Q. You testified that you went back to work after being discharged by Dr. Krause because you were under some financial distress; you needed the money?

A. Well, yes.

Q. You had to pay bills, I think you said?

A. Yes.

Q. During this period that you were receiving treatment from Dr. Krause, did your employer make it possible for you to receive any financial assistance?" R. 315a-316a

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

Nothing in the Case at Bar Remotely Approaches the Situations Which Were Before This Court in the Cases of Eichel and Tipton.

Nothing in *Eichel*[2] and *Tipton*[3] or any other decision by this or any other court permits the plaintiff in a personal injury action to use the rule against evidence of collateral source benefits as an offensive weapon which the defendant is powerless to deflect.

This case was not brought in a federal court because plaintiff was attempting to enforce a federally created right as under F. E. L. A.[4] or the Jones Act.[5] It is, therefore, doubtful that Eichel or Tipton have any application, for in Eichel this court said that the introduction of collateral source benefits by a defendant attempting to establish an "affirmative defense":

> ". . . would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937 . . . were considered as evidence of malingering . . ." 375 U. S. at 255.

That certainly is the interpretation which at least one Court of Appeals has placed upon Eichel and Tipton.

> "Both Tipton and Eichel reflect a strong policy against the use of such collateral source evidence in F. E. L. A. and analogous Jones Act—maritime law seamen's cases." *Page v. St. Louis Southwestern Ry. Co.* 349 F. 2d 820, 822 (C. A. 5, 1965).

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2. *Eichel v. New York Central R. R. Co.*, 375 U. S. 253.
3. *Tipton v. Socony Mobil Oil Co. Inc.*, 375 U. S. 34.
4. 45 USCA 51.
5. 46 USCA 688.

Judge Breitenstein of the Tenth Circuit, writing for the First Circuit (by special designation) in *Thompson v. Kawasaki Kisen, K. K. etc.*, 348 F. 2d 879 at 881 put it succinctly:

> "The instant case is not based on any federal statute but rather on ordinary negligence. No authority of which we are aware holds that the rules of evidence applicable to ordinary negligence cases do not apply when the plaintiff is a longshoreman and the defendant is a shipowner. Rule 43(a) F. R. C. P. provides that evidence shall be admissible . . . and that the rule which favors the reception of the evidence governs." [footnote omitted] 348 F. 2d at 881.

Petitioner is, therefore, not on firm ground when he asserts that this court should examine a case where a District Judge and three Judges of the Court of Appeals have clearly held that it would be unfair to mute a defendant upon a point which plaintiff himself has used as an offensive weapon.

It must be recalled that the fact that Petitioner was entitled to receive and actually did receive benefits under a compensation statute was never mentioned, except possibly by indirection on the part of plaintiff and plaintiff's counsel. The fact of the matter is that "Workmen's Compensation" was never mentioned at all.

There was no attempt by defendant to make use of collateral source as an offensive weapon. The subject had been gratuitously opened by plaintiff and plaintiff's counsel. This is a far different situation than Tipton and Eichel, where collateral source was opened, not by plaintiff, but by defendant in an attempt to establish a sort of "affirmative defense" of malingering. Here, the plaintiff attempted to

"puff" his case and fundamental fairness required that defendant should not have been prevented from "unpuffing" it.

Judge Freedman, writing for an unanimous Court of Appeals, was clearly right when he said:

> "The barriers which have been created against the admission of otherwise relevant evidence because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area." — F. 2d — [16a, appendix to Petion]

Fundamental fairness precludes any such result as that which Petitioner asks this court to grant. Petitioner, in a sense, set the ground rules. He had no sound reason to open up the collateral source point. Having opened it, he cannot criticize the defendant who closed it as gently and as circumspectly as possible. Petitioner's afterthought complaints do not merit judicial sympathy.

Nothing in this case merits this court's review. There is no conflict. This court's decisions are plain and have been followed.

The Petition should be dismissed.

Respectfully submitted,

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